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Case No. ED CV 10-0830 JCG

MEMORANDUM OPINION AND ORDER

Defendant.

INTRODUCTION AND SUMMARY

In sum, having carefully studied, *inter alia*, the parties' joint stipulation and the administrative record, the Court concludes that, as detailed below, the

1 Administrative Law Judge (“ALJ”) improperly evaluated the opinion of Plaintiff’s
2 treating physician. The Court thus remands this matter to the Commissioner in
3 accordance with the principles and instructions enunciated in this Memorandum
4 Opinion and Order.

5 II.

6 **PERTINENT FACTUAL AND PROCEDURAL BACKGROUND**

7 Plaintiff, who was 48 years old on the date of his administrative hearing, has
8 completed the eleventh grade. (*See* Administrative Record (“AR”) at 16, 76, 93.)

9 On October 16, 2006, Plaintiff filed for DIB and SSI, alleging that he has been
10 disabled since July 1, 2004 due to Crohn’s disease. (*See* AR at 9, 38, 43, 76.)

11 On July 30, 2008, Plaintiff, represented by counsel, appeared and testified at a
12 hearing before an ALJ. (*See* AR at 16-30.)

13 On August 29, 2008, the ALJ denied Plaintiff’s request for benefits. (AR at 9-
14 15.) Applying the well-known five-step sequential evaluation process, the ALJ
15 found, at step one, that Plaintiff has not engaged in substantial gainful activity since
16 his alleged onset date. (*Id.* at 11.)

17 At step two, the ALJ found that Plaintiff suffers from a severe impairment of
18 the “gastrointestinal system.” (AR at 11 (emphasis omitted).)

19 At step three, the ALJ determined that the evidence did not demonstrate that
20 Plaintiff’s impairment, either individually or in combination, met or medically
21 equaled the severity of any listing set forth in the Social Security regulations.^{1/} (AR
22 at 12.)

23 The ALJ then assessed Plaintiff’s residual functional capacity^{2/} (“RFC”) and
24

25 ^{1/} *See* 20 C.F.R. pt. 404, subpt. P, app. 1.

26 ^{2/} Residual functional capacity is what a claimant can still do despite existing
27 exertional and nonexertional limitations. *Cooper v. Sullivan*, 880 F.2d 1152, 1155
28 n. 5 (9th Cir. 1989). “Between steps three and four of the five-step evaluation, the

1 determined that he can perform medium work. (AR at 12.) Specifically, the ALJ
2 found that Plaintiff “is precluded from climbing ladders, ropes and scaffolds; and
3 should not work with hazardous machinery or at unprotected heights.” (*Id.*
4 (emphasis omitted).)

5 The ALJ found, at step four, that Plaintiff retained the ability to perform his
6 past relevant work as a general laborer. (AR at 14.) Thus, the ALJ concluded that
7 Plaintiff was not suffering from a disability as defined by the Act. (*Id.* at 9, 15.)

8 Plaintiff filed a timely request for review of the ALJ’s decision, which was
9 denied by the Appeals Council. (AR at 1-3, 5.) The ALJ’s decision stands as the
10 final decision of the Commissioner.

11 III.

12 STANDARD OF REVIEW

13 This Court is empowered to review decisions by the Commissioner to deny
14 benefits. 42 U.S.C. § 405(g). The findings and decision of the Social Security
15 Administration must be upheld if they are free of legal error and supported by
16 substantial evidence. *Mayes v. Massanari*, 276 F.3d 453, 458-59 (9th Cir. 2001, *as*
17 *amended* Dec. 21, 2001). If the court, however, determines that the ALJ’s findings
18 are based on legal error or are not supported by substantial evidence in the record,
19 the court may reject the findings and set aside the decision to deny benefits.
20 *Aukland v. Massanari*, 257 F.3d 1033, 1035 (9th Cir. 2001); *Tonapetyan v. Halter*,
21 242 F.3d 1144, 1147 (9th Cir. 2001).

22 “Substantial evidence is more than a mere scintilla, but less than a
23 preponderance.” *Aukland*, 257 F.3d at 1035. Substantial evidence is such “relevant
24 evidence which a reasonable person might accept as adequate to support a

25
26 _____
27 ALJ must proceed to an intermediate step in which the ALJ assesses the claimant’s
28 residual functional capacity.” *Massachi v. Astrue*, 486 F.3d 1149, 1151 n. 2 (9th
Cir. 2007).

1 conclusion.” *Reddick v. Chater*, 157 F.3d 715, 720 (9th Cir. 1998); *Mayes*, 276 F.3d
2 at 459. To determine whether substantial evidence supports the ALJ’s finding, the
3 reviewing court must review the administrative record as a whole, “weighing both
4 the evidence that supports and the evidence that detracts from the ALJ’s
5 conclusion.” *Mayes*, 276 F.3d at 459. The ALJ’s decision “‘cannot be affirmed
6 simply by isolating a specific quantum of supporting evidence.’” *Aukland*, 257 F.3d
7 at 1035 (quoting *Sousa v. Callahan*, 143 F.3d 1240, 1243 (9th Cir. 1998)). If the
8 evidence can reasonably support either affirming or reversing the ALJ’s decision,
9 the reviewing court “‘may not substitute its judgment for that of the ALJ.’” *Id.*
10 (quoting *Matney ex rel. Matney v. Sullivan*, 981 F.2d 1016, 1018 (9th Cir. 1992)).

11 IV.

12 ISSUES PRESENTED

13 Two disputed issues are presented for decision here:

- 14 1. whether the ALJ properly evaluated Plaintiff’s left shoulder condition,
15 (*see* Joint Stip. at 3-6, 11-13); and
- 16 2. whether the ALJ failed to properly assess Plaintiff’s ability to perform
17 his past relevant work. (*Id.* at 13-14, 16.)

18 Under the circumstances here, the Court finds the issue of the ALJ’s
19 evaluation of Plaintiff’s left shoulder condition to be dispositive of this matter, and
20 does not reach the remaining issue.

21 V.

22 DISCUSSION AND ANALYSIS

23 A. Evaluation of the Medical Evidence

24 Plaintiff argues that the ALJ “failed to develop the record” and “erred in
25 finding that [Plaintiff’s shoulder] condition did not constitute a severe impairment at
26 Step Two.” (Joint Stip. at 5.) Plaintiff contends that the ALJ failed to properly
27 assess his left shoulder condition despite the fact that Plaintiff’s treating physician
28 Martha Melendez, M.D. (“Dr. Melendez”) diagnosed him with “either a shoulder

1 impingement or . . . a ‘frozen’ shoulder,” both of which are severe impairments. (*Id.*
2 at 3-4.)

3 1. The ALJ Must Provide Specific and Legitimate Reasons
4 Supported by Substantial Evidence to Reject a Treating
5 Physician’s Opinion

6 In evaluating medical opinions, Ninth Circuit case law and Social Security
7 regulations distinguish among the opinions of three types of physicians:

8 (1) those who treat the claimant (treating physicians);

9 (2) those who examine but do not treat the claimant (examining physicians);

10 and

11 (3) those who neither examine nor treat the claimant (non-examining
12 physicians). *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir. 1995, *as amended* April 9,
13 1996); *see also* 20 C.F.R. §§ 404.1527(d) & 416.927(d) (prescribing the respective
14 weight to be given the opinion of treating sources and examining sources).

15 “As a general rule, more weight should be given to the opinion of a treating
16 source than to the opinion of doctors who do not treat the claimant.” *Lester*, 81 F.3d
17 at 830; *accord Benton ex rel. Benton v. Barnhart*, 331 F.3d 1030, 1036 (9th Cir.
18 2003). This is so because a treating physician “is employed to cure and has a greater
19 opportunity to know and observe the patient as an individual.” *Sprague v. Bowen*,
20 812 F.2d 1226, 1230 (9th Cir. 1987).

21 Where the treating physician’s “opinion is not contradicted by another doctor,
22 it may be rejected only for ‘clear and convincing’ reasons.” *Benton*, 331 F.3d at
23 1036; *see also Andrews v. Shalala*, 53 F.3d 1035, 1041 (9th Cir. 1995) (“While the
24 ALJ may disregard the opinion of a treating physician, whether or not controverted,
25 the ALJ may reject an *uncontroverted* opinion of a treating physician only for clear
26 and convincing reasons.”) (*italics in original*).

27 “Even if the treating doctor’s opinion is contradicted by another doctor, the
28 [ALJ] may not reject this opinion without providing specific and legitimate reasons

1 supported by substantial evidence in the record[.]” *Lester*, 81 F.3d at 830 (internal
2 quotation marks and citation omitted); *accord Reddick*, 157 F.3d at 725.

3 The ALJ can meet the requisite specific and legitimate standard “by setting
4 out a detailed and thorough summary of the facts and conflicting clinical evidence,
5 stating his interpretation thereof, and making findings.” *Magallanes v. Bowen*, 881
6 F.2d 747, 751 (9th Cir. 1989) (internal quotation marks and citation omitted).

7 2. The ALJ Improperly Evaluated Dr. Melendez’s opinion

8 Having carefully reviewed the record and the joint stipulation, the Court is
9 persuaded that the ALJ’s assessment of Dr. Melendez’s opinion regarding Plaintiff’s
10 left shoulder impairment is not legally sufficient and/or supported by substantial
11 evidence. Two reasons guide this Court’s determination.

12 First, the Court disagrees with the ALJ’s conclusion that “[t]here is no
13 evidence that [Plaintiff’s left shoulder impairment] will not resolve quickly with
14 physical therapy and medications.” (AR at 11.) On April 21, 2008, Dr. Melendez
15 found that Plaintiff “is unable to abduct [his] shoulder past about [a] 90-degree
16 angle.” (*Id.* at 366.) Dr. Melendez prescribed physical therapy and ordered “an
17 MRI of the left shoulder” for further assessment. (*Id.*) Dr. Melendez noted that
18 Plaintiff “has plenty of pain medicine, but his shoulder is still bothering him.” (*Id.*)

19 On July 30, 2008, at the administrative hearing, Plaintiff testified that his “left
20 shoulder is in pain” and he “can’t extend [his] arm . . . over [his] head.” (AR at 20.)
21 Plaintiff explained that he has “had the problems with [his shoulder]” for “[a]bout a
22 year now[.]” (*Id.*) He indicated that he “had an accident a few years back and in the
23 accident, [his] whole left side hit the center part of the car.” (*Id.* at 26.) Plaintiff
24 further testified that he has been “homeless” for “[p]robably two years or longer”
25 and “live[s] in a tent” in Santa Ana. (*Id.* at 26-27; *see also id.* at 95 (Plaintiff
26 indicating he “live[s] in a tent next to the Redlands airport in Redlands Wash”), 338
27 (Plaintiff unable to receive treatment for Crohn’s disease “because he is homeless
28 [and] is unable to arrange for transportation and be able to take the preparation or [to

1 be on time] at the hospital by 7 a.m.”).)

2 Accordingly, the Court finds that the ALJ’s paraphrasing of Dr. Melendez’s
3 opinion is not entirely accurate. *See Reddick*, 157 F.3d at 722-23 (“[T]he ALJ
4 developed his evidentiary basis by not fully accounting for the context of materials
5 or all parts of the testimony and reports. His paraphrasing of record material is not
6 entirely accurate regarding the content or tone of the record.”). The record does not
7 indicate that Plaintiff’s left shoulder impairment will “resolve quickly.” (AR at 11.)

8 Instead, no evidence in the record conclusively establishes the restrictions
9 caused by Plaintiff’s shoulder impairment.^{3/} Thus, the ALJ had a duty to develop the
10 record. *See* 20 C.F.R. §§ 404.1512(e)(1) (“We will seek additional evidence or
11 clarification from your medical source when the report from your medical source
12 contains a conflict or ambiguity that must be resolved, the report does not contain all
13 the necessary information, or does not appear to be based on medically acceptable
14 clinical and laboratory diagnostic techniques.”) & 416.912(e)(1) (same); *see also*
15 *Higbee v. Sullivan*, 975 F.2d 558, 561 (9th Cir. 1992, *as amended* Sept. 17, 1992)
16 (*per curiam*) (Although it is plaintiff’s burden to provide sufficient evidence of
17 entitlement of benefits, it has “long [been] recognized that the ALJ is not a mere
18 umpire at [an administrative hearing], but has an independent duty to fully develop
19 the record[.]”).

20 Further, the ALJ erred because he has, in effect, improperly substituted his
21 own interpretation of the evidence without setting forth sufficient authority or
22 medical evidence to support his interpretation. *See Tackett v. Apfel*, 180 F.3d 1094,
23 1102-03 (9th Cir. 1999) (ALJ may not substitute his own interpretation of the
24 medical evidence for the opinion of medical professionals); *Banks v. Barnhart*, 434

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26 ^{3/} To the extent the ALJ rejected Dr. Melendez’s opinion because “there is no
27 firm diagnosis,” (AR at 11), the Court finds that the ALJ had a duty to develop the
28 record as discussed below. Dr. Melendez diagnosed Plaintiff with “[l]eft shoulder
impingement versus frozen shoulder syndrome.” (*Id.* at 366.)

1 F. Supp. 2d 800, 805 (C.D. Cal. 2006) (“An ALJ cannot arbitrarily substitute his
2 own judgment for competent medical opinion, and he must not succumb to the
3 temptation to play doctor and make his own independent medical findings.”)
4 (internal quotation marks, alterations and citations omitted). Here, there was
5 insufficient evidence for the ALJ to determine whether Plaintiff’s shoulder
6 impairment would “resolve quickly.” (AR at 11.) As explained above, Dr.
7 Melendez ordered an MRI for further assessment of Plaintiff’s left shoulder
8 impairment and noted that Plaintiff’s complaints were not resolved with “plenty of
9 pain medicine.”^{4/} (*Id.* at 366.)

10 Second, Defendant argues that “the ALJ reasonably relied on the findings and
11 opinion of consultative examining internist [Sean S. To, M.D. (“Dr. To”)] as
12 indicating that Plaintiff did not have a severe left shoulder condition or a disability.”
13 (Joint Stip. at 9.) The Court’s review is limited to the reasons *actually cited* by the
14 ALJ in his decision, specifically, in assessing Dr. Melendez’s opinion. *See Orn v.*
15 *Astrue*, 495 F.3d 625, 630 (9th Cir. 2007) (“We review only the reasons provided by
16 the ALJ in the disability determination and may not affirm the ALJ on a ground
17 upon which he did not rely.”). However, the ALJ did not explicitly rely on Dr. To’s
18 opinion in evaluating Dr. Melendez’s opinion.

19 In any event, to the extent the ALJ relied on Dr. To’s opinion in finding that
20 Plaintiff does not suffer from any left shoulder restrictions, the ALJ’s decision is
21 undermined because Dr. To formed his conclusions prior to the onset of Plaintiff’s
22

23 ^{4/} Moreover, the Court notes that Plaintiff had difficulty receiving treatment for
24 Crohn’s disease because he is homeless. (AR at 26-27, 338); *cf. Gamble v. Chater*,
25 68 F.3d 319, 321 (9th Cir. 1995) (“We certainly agree with all the other circuits that
26 a disabled claimant cannot be denied benefits for failing to obtain medical treatment
27 that would ameliorate his condition if he cannot afford that treatment.”). It is
28 unclear from the record whether Plaintiff has been able to receive consistent or
followup treatment for his shoulder impairment.

1 shoulder impairment. Dr. To conducted a complete internal medicine evaluation of
2 Plaintiff on March 26, 2007. (See AR at 320-24.) Dr. To found the range of motion
3 in Plaintiff's shoulders and upper extremities were "grossly normal bilaterally." (*Id.*
4 at 322.) However, on April 21, 2008, Dr. Melendez found Plaintiff was "unable to
5 abduct [his] shoulder past about [a] 90-degree angle." (*Id.* at 366.) On July 30,
6 2008, Plaintiff testified that he had been experiencing problems with his shoulder for
7 "[a]bout a year now[.]" (*Id.* at 16, 20.) Thus, any reliance on Dr. To's opinion is not
8 supported by substantial evidence.

9 VI.

10 REMAND IS APPROPRIATE

11 This Court has discretion to remand or reverse and award benefits. *McAllister*
12 *v. Sullivan*, 888 F.2d 599, 603 (9th Cir. 1989, *as amended* Oct. 19, 1989). Where no
13 useful purpose would be served by further proceedings, or where the record has been
14 fully developed, it is appropriate to exercise this discretion to direct an immediate
15 award of benefits. See *Benecke v. Barnhart*, 379 F.3d 587, 595-96 (9th Cir. 2004);
16 *Harman v. Apfel*, 211 F.3d 1172, 1179-80 (9th Cir. 2000, *as amended* May 4, 2000),
17 *cert. denied*, 531 U.S. 1038 (2000). Where there are outstanding issues that must be
18 resolved before a determination can be made, and it is not clear from the record that
19 the ALJ would be required to find plaintiff disabled if all the evidence were properly
20 evaluated, remand is appropriate. See *Benecke*, 379 F.3d at 595-96; *Harman*, 211
21 F.3d at 1179-80.

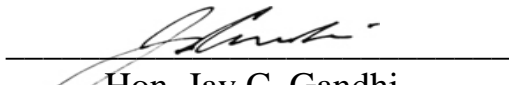
22 Here, remand is required because the ALJ failed to properly evaluate Dr.
23 Melendez's opinion.

24 Because the Court concludes that the ALJ erred in assessing Dr. Melendez's
25 opinion and failed to fully and fairly develop the record, it does not reach Plaintiff's
26 remaining contention. (See Joint Stip. at 13-14, 16.) Whether Plaintiff is capable of
27 performing his past relevant work depends on RFC findings, which are reviewed in
28 light of the record as a whole. See *Hayes v. Astrue*, 270 Fed.Appx. 502, 505 (9th

1 Cir. 2008). Accordingly, on remand, the ALJ shall assume that Plaintiff's left
2 shoulder impairment is severe. In addition, the ALJ shall obtain additional
3 information and clarification regarding Plaintiff's functional limitations with respect
4 to his shoulder impairment. The ALJ must then consider Plaintiff's shoulder
5 impairment in assessing his RFC. The ALJ shall reassess the medical opinions in
6 the record and provide sufficient reasons under the applicable legal standard for
7 rejecting any portion of the medical opinions.

8 Based on the foregoing, IT IS ORDERED THAT judgment shall be entered
9 **REVERSING** the decision of the Commissioner denying benefits and
10 **REMANDING** the matter for further administrative action consistent with this
11 decision.

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13
14 Dated: May 6, 2011


Hon. Jay C. Gandhi
United States Magistrate Judge